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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

NATHAN COZZITORTO, et al., Plaintiffs and Respondents, v. AMERICAN AUTOMOBILE ASSOCIATION OF NORTHERN CALIFORNIA, NEVADA, & UTAH, Defendant and Appellant.	A143538 (Contra Costa County Super. Ct. No. MSC13-02656)

Defendant American Automobile Association of Northern California, Nevada, & Utah (AAA) appeals the trial court's order denying for lack of standing their motion to disqualify counsel for plaintiffs Nathan Cozzitorto, Rena Cozzitorto, and Michael Cozzitorto, Sr., individually (the Cozzitortos) and doing business as Cozz's Auto Body & Service, Inc. (Cozz's Inc.) (collectively, plaintiffs). We affirm.

BACKGROUND

In December 2013, plaintiffs filed the instant lawsuit. The operative second amended complaint (complaint) alleges the following: Plaintiffs provide emergency road services to AAA members pursuant to AAA's standard Emergency Road Service Contract Station Agreement (Agreement). Although AAA classifies plaintiffs as independent contractors, AAA in fact exerts complete control over the provision of AAA emergency road services and the Cozzitortos are therefore employees of AAA. AAA obligates the Cozzitortos to incur expenses in the discharge of their AAA emergency road

services duties—for example, maintenance, cleaning, painting, and fuel—but fails to reimburse them for those expenses. In addition, AAA failed to pay Cozz's Inc. pursuant to the terms of the Agreement.

The complaint also asserts class allegations. It asserts causes of action under Labor Code section 2802[1] and Business and Professions Code section 17200 et seq.[2] on behalf of the Cozzitortos and similarly situated individuals, defined by the complaint as "All persons who currently perform, or have performed, emergency road service for [AAA] in the State of California and who were misclassified and labeled as independent contractors by [AAA]." It asserts a breach of contract cause of action on behalf of Cozz's Inc. and similarly situated contract stations that performed emergency road services pursuant to the Agreement. Plaintiffs have not yet sought class certification.

AAA moved to disqualify plaintiffs' counsel, Cotchett, Pitre & McCarthy, LLP (Cotchett). AAA did not purport to be current or prior clients of Cotchett or to have had a confidential relationship with Cotchett. Instead, AAA argued the interests of the Cozzitortos and the putative individual class members are adverse to those of Cozz's Inc. and the putative contract station class members, such that Cotchett could not represent both. Plaintiffs' opposition argued AAA lacked standing to seek Cotchett's disqualification. The trial court agreed with plaintiffs and denied AAA's motion. This appeal followed.

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[1] Labor Code section 2802, subdivision (a), provides, in relevant part: "An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties . . . ."

[2] Business and Professions Code section 17200 et seq., the Unfair Competition Law, " 'provides an equitable means through which both public prosecutors and private individuals can bring suit to prevent unfair business practices and restore money or property to victims of these practices.' " (*Zhang v. Superior Court* (2013) 57 Cal.4th 364, 371.)

DISCUSSION

I. *Legal Standards*

"Attorneys have a duty to maintain undivided loyalty to their clients to avoid undermining public confidence in the legal profession and the judicial process. [Citations.] The effective functioning of the fiduciary relationship between attorney and client depends on the client's trust and confidence in counsel. [Citation.] The courts will protect clients' legitimate expectations of loyalty to preserve this essential basis for trust and security in the attorney-client relationship. [Citation.] Therefore, if an attorney—or more likely a law firm—simultaneously represents clients who have conflicting interests, a more stringent per se rule of disqualification applies. With few exceptions, disqualification follows automatically, regardless of whether the simultaneous representations have anything in common or present any risk that confidences obtained in one matter would be used in the other." (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1146–1147 (*SpeeDee Oil*).) This principle is reflected in the State Bar Rules of Professional Conduct, which provide: "A member shall not, without the informed written consent of each client: [¶] (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or [¶] (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict . . . ." (Rules Prof. Conduct, rule 3-310(C).)[3]

"[A] moving party must have standing, that is, an invasion of a legally cognizable interest, to disqualify an attorney." (*Great Lakes, supra,* 186 Cal.App.4th at p. 1357.) The injury must be "concrete and particularized, not hypothetical." (*Id.* at p. 1358; see also *id.* at p. 1359 ["a highly speculative and tactical interest does not meet the standing requirements"].) "[I]mposing a standing requirement for attorney disqualification

[3] "The State Bar Rules of Professional Conduct govern attorney discipline, not standards for disqualification in the courts. [Citation.] We often look to the Rules of Professional Conduct for guidance." (*Great Lakes Construction, Inc. v. Burman* (2010) 186 Cal.App.4th 1347, 1356, fn. 5 (*Great Lakes*).)

motions protects against the strategic exploitation of the rules of ethics and guards against improper use of disqualification as a litigation tactic." (*Id.* at p. 1358.) "Generally, before the disqualification of an attorney is proper, the complaining party must have or must have had an attorney-client relationship with that attorney." (*Id.* at p. 1356.) However, in *Kennedy v. Eldridge* (2011) 201 Cal.App.4th 1197 (*Kennedy*), the court held standing can be established "where an attorney's continued representation threatens an opposing litigant with cognizable injury *or would undermine the integrity of the judicial process* . . . ." (*Id.* at p. 1205, italics added.)

An order denying a disqualification motion is an appealable order. (*Roush v. Seagate Technology, LLC* (2007) 150 Cal.App.4th 210, 218.) "Generally, a trial court's decision on a disqualification motion is reviewed for abuse of discretion. [Citations.] If the trial court resolved disputed factual issues, the reviewing court should not substitute its judgment for the trial court's express or implied findings supported by substantial evidence. [Citations.] When substantial evidence supports the trial court's factual findings, the appellate court reviews the conclusions based on those findings for abuse of discretion. [Citation.] However, the trial court's discretion is limited by the applicable legal principles. [Citation.] Thus, where there are no material disputed factual issues, the appellate court reviews the trial court's determination as a question of law. [Citation.] In any event, a disqualification motion involves concerns that justify careful review of the trial court's exercise of discretion." (*SpeeDee Oil, supra,* 20 Cal.4th at pp. 1143–1144.)

II. *The Trial Court Applied the Correct Legal Standard*

AAA contends the trial court applied the wrong legal standard in determining whether AAA had standing to disqualify plaintiffs' counsel. We disagree.

AAA argues the trial court held that to demonstrate Cotchett's representation "would undermine the integrity of the judicial process" (*Kennedy, supra,* 201 Cal.App.4th at p. 1205), AAA must show a likelihood that the representation will affect the outcome of the proceedings before the court. The challenged portion of the trial court's written order provides as follows: "[T]he Court finds that none of the asserted conflicts support a conclusion that [Cotchett]'s continued involvement in this matter

would undermine the judicial process. Accordingly, [AAA] does not have standing to bring the Motion.[4] Even if one or more of them did, the test for disqualification is 'whether there exists a genuine likelihood that the status or misconduct of the attorney in question will affect the outcome of the proceedings before the court.' *Cal Pa[k] Delivery,* [*Inc. v. United Postal Service, Inc* (1997)] 52 Cal.App.4th [1,] 11. For the reasons set forth below, the Court also finds that at present, there is nothing to compel a conclusion that [Cotchett]'s status would affect the outcome of the proceedings before the Court."

We think it evident that the trial court first concluded Cotchett's continued representation would not undermine judicial integrity and AAA therefore lacked standing, and then held in the alternative that even if AAA had standing, its motion would fail on the merits. This conclusion is bolstered by the trial court's citation to *Cal Pak Delivery, Inc. v. United Parcel Service, Inc.*, *supra,* 52 Cal.App.4th at p. 11 (*Cal Pak*). In the quoted portion of *Cal Pak*, the court was discussing and applying the standard for disqualification, having just noted that " '[d]isqualification is inappropriate . . . simply to punish a dereliction that will likely have no substantial continuing effect on future judicial proceedings.' " (*Cal Pak, supra,* at p. 11.) The trial court did not misstate the standing analysis set forth in *Kennedy*.

III. *AAA Lacks Standing to Disqualify Plaintiffs' Counsel*

A. *The Purported Conflict*

AAA explains the purported conflict of interest as follows: "The individual Cozzitortos and the putative individual class members could not have incurred any unpaid business expenses unless the Contract Stations for which they work failed to reimburse them in the first instance. They are, in the first instance, employees or owners of their respective Contract Stations. For that reason, the Contract Stations are all but certain to be deemed joint employers of the individuals claiming entitlement to reimbursements, even if [AAA] misclassified them as independent contractors.

[4] The trial court previously concluded AAA failed to demonstrate a cognizable injury.

Accordingly, [Cotchett] represents both the individuals claiming they are owed expense reimbursements, ***and*** the businesses that allegedly failed to reimburse them, all in the same case. Further exacerbating [Cotchett]'s conflict of interest is the fact that Cozz's Inc. must indemnify [AAA] for any employment related claims brought by its (Cozz's Inc.) employees against [AAA]."[5]

As we understand the argument, AAA does not dispute that the individual employees seek reimbursement from AAA for expenses incurred in performing work for AAA members. However, AAA contends that if AAA is liable for these expenses, the contract stations may *also* be liable for reimbursement of the same expenses. AAA asserts two theories by which the contract stations may be liable: they may be directly liable to the employees as joint employers, or they may be liable under the Agreement to indemnify AAA for any recovery awarded to the employees from AAA.[6] AAA contends the employees and contract stations therefore have adverse interests.

In response, plaintiffs distinguish between the individual owners and principals of contract stations on the one hand, and "W-2" employees on the other. Plaintiffs assert that only the former are seeking reimbursement of unpaid expenses under Labor Code section 2802.[7] AAA does not argue that the interests of owner/principal employees—as opposed to the interests of other employees—are adverse to their respective contract stations. Therefore, plaintiffs argue, there is no conflict of interest with respect to the unreimbursed expenses.

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[5] In its reply brief, AAA argues for the first time that there is also a conflict with respect to the Unfair Competition Law claims. We decline to consider this belated argument. (*Cates v. Chiang* (2013) 213 Cal.App.4th 791, 814–815.)

[6] We express no opinion on the merits of either theory. In particular, we need not and do not resolve the parties' dispute as to whether the indemnification provision is limited to claims of personal injury and death.

[7] As AAA points out, this distinction is not reflected in the complaint, which asserts the Labor Code section 2802 on behalf of all allegedly misclassified individuals.

AAA argues that by taking this position, plaintiffs have abandoned the interests of non-owner/principal employees and thereby proven the conflict. However, we understand plaintiffs' assertion to be a factual one: only owners and principals have in fact incurred the challenged expenses; other employees have not. As explained in plaintiffs' brief, employees "who are not owners/principals of AAA Contract Stations . . . do not seek reimbursement under Section 2802 (as they do not incur the capital expenditures that are required to service AAA members) . . . ." Plaintiffs' counsel made similar representations to the trial court at oral argument: "Employees of the principals are not the ones spending the money; therefore, they cannot get reimbursable expenses"; "principals are the ones who are spending the money that are entitled to reimbursement; their employees are not. That's the facts. . . . That's what they'll all tell you at the time of trial."

With this understanding of the purported conflict of interest, we now turn to the question of whether AAA has shown that Cotchett's continued representation would undermine the integrity of the judicial process or threaten AAA with cognizable injury.

B. *Integrity of the Judicial Process*

1. *Named Plaintiffs*

The trial court rejected AAA's contention that the interests of the Cozzitortos and Cozz's Inc. were adverse. The trial court found: "The three named Cozzitorto Plaintiffs are the owners of Cozz's [Inc.]" and therefore "could not be considered employees of Cozz's [Inc.] under any circumstances—they own Cozz's [Inc.]. If they are entitled to reimbursement, they are entitled to reimbursement directly from [AAA], not from themselves."

As noted above, AAA does not argue that the interests of owners/principals are adverse to their respective contract stations. AAA's sole challenge to this ruling is an argument, based on evidence not before the trial court, that Nathan Cozzitorto is not an owner of Cozz's Inc. AAA requests that we take judicial notice of discovery responses, received after the appealed-from order, in which the Cozzitortos admit Nathan Cozzitorto lacks a current equity interest in Cozz's Inc. In response, plaintiffs assert that Nathan is

the sole beneficiary of all of the ownership shares of Cozz's Inc. The extent of Nathan's ownership interest in Cozz's Inc. is a factual question for the trial court, which we will not resolve.[8] AAA is not precluded from renewing its motion in the trial court based on new facts.

2. *Putative Class Members*

The trial court concluded AAA's challenge to Cotchett's representation based on a conflict of interest between the individual and contract station putative class members was "premature. At this state of the litigation, [Cotchett] does not even represent unnamed class members, and as such, could owe them no duty of loyalty. *Kullar v. Foot Locker Retail, Inc.* (2011) 191 Cal.App.4th 1201, 1205-[12]06. [Cotchett]'s adequacy to serve as class counsel is an issue that will properly be decided in connection with a motion for class certification."

AAA argues Cotchett currently owes a duty of loyalty to putative class members. In *Kullar v. Foot Locker Retail, Inc., supra,* 191 Cal.App.4th 1201 (*Kullar*), the Court of Appeal noted that because no class had been certified, "no attorney-client relationship has yet arisen between [the law firm representing the named plaintiff] and the members of the putative class." (*Id.* at p. 1205.) *Kullar* did not decide whether counsel owed the putative class members fiduciary duties absent this attorney-client relationship, finding cases cited by a party "inapposite to establish that an attorney may incur fiduciary obligations to an individual even though an attorney-client relationship has not arisen." (*Ibid.*) Instead, the court concluded that, "assuming that [the law firm] assumed some fiduciary obligations to members of the putative class they seek to represent," these obligations were not breached by counsel's challenged conduct. (*Id.* at p. 1206.)

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[8] Accordingly, we decline AAA's January 20, 2015 request for judicial notice. (*Haworth v. Superior Court* (2010) 50 Cal.4th 372, 379, fn. 2 [" 'Reviewing courts generally do not take judicial notice of evidence not presented to the trial court' absent exceptional circumstances.' "].) We also deny as irrelevant plaintiffs' April 13, 2015 request that we take judicial notice of an order in the instant litigation issued after the challenged order and by a different judge.

Like the *Kullar* court, we need not decide the existence or scope of any duty of loyalty owed to putative class members by counsel for a named plaintiff in a putative class action. For present purposes, our inquiry is not whether any such duty has been breached, but rather whether Cotchett's continued representation will undermine the integrity of the judicial process. At this stage of the litigation, we conclude it will not. The only conflict asserted by AAA is between non-owner/principal employees and contract stations with respect to the Labor Code section 2802 claim. However, plaintiffs have represented that no non-owner/principal employee incurred nonreimbursed expenses working for AAA members. AAA has not argued we should reject this representation or provided any basis for us to do so. Accordingly, based on plaintiffs' representation of the facts, Cotchett's continued representation will not undermine the integrity of the judicial process.[9]

Because we rely on plaintiffs' representation of the facts, we express no opinion on the appropriate resolution should the facts prove otherwise, or on whether any resulting conflict could be waived in writing. (See *Sharp v. Next Entertainment, Inc.* (2008) 163 Cal.App.4th 410, 429 (*Sharp*) ["[A]utomatic disqualification is not required in all circumstances where representation of one client creates actual or potential conflicts of interests with another client . . . . Rather, clients may consent in writing [citation] to continued representation by the conflicted attorney . . . ."].)

C. *Cognizable Injury*

AAA contends Cotchett's continued representation threatens cognizable injury because the res judicata effect of any subsequent judgment may be in question. The trial court found this purported injury too speculative to support standing. We agree with the trial court's conclusion.

As AAA points out, courts have noted the possibility that conflicted class counsel could threaten the res judicata effect of a resulting judgment. (See *Cal Pak, supra,* 52

[9] For the same reasons, we reject AAA's argument that the trial court erred in finding premature the question of a conflict of interest with respect to putative class members.

Cal.App.4th at p. 13 [finding the plaintiff's counsel's continued presence in the case "could well impact the preclusive effect given to the eventual result"].) In light of our discussion above and the fact that Cotchett must be found competent to represent the class before the class is certified (*Sharp, supra*, 163 Cal.App.4th at pp. 432–433), the injury is currently too speculative to support standing. This case is a far cry from *Cal Pak*, relied on by AAA, in which the plaintiff's counsel in a putative class action "admitted he had offered to sell out his client and the class which the client was seeking to represent for a payment to himself personally of approximately $8 to $10 million dollars." (*Cal Pak, supra*, at pp. 5–6; see also *id.* at p. 13 [affirming order disqualifying the plaintiff's counsel prior to class certification].)

DISPOSITION

The order is affirmed. Plaintiffs shall recover their costs on appeal.

SIMONS, J.

We concur.

JONES, P.J.

BRUINIERS, J.